No. 19-667

In the Supreme Court of the United States

MICHAEL BAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's convictions for wire fraud and securities fraud, in violation of 18 U.S.C. 1343 and 18 U.S.C. 1348 (2006), required proof not only that he deceived shareholders of his company in order to increase the stock price and enrich himself, but also that a specific property interest of the shareholders was directly transferred to him.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 923 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2019. A petition for rehearing was denied on June 27, 2019 (Pet. App. 38-39). On September 6, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 25, 2019. On October 3, 2019, Justice Alito further extended the time to and including November 22, 2019, and the petition was filed on November 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was

convicted of conspiracy to commit wire and securities fraud, in violation of 18 U.S.C. 1349; seven counts of wire fraud, in violation of 18 U.S.C. 1343; two counts of securities fraud, in violation of 18 U.S.C. 1348 (2006); and two counts of false statements to the Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 1001. 11/16/17 Judgment 1-2. The court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1-37.

1. Petitioner was the chief executive officer of ArthroCare, a publicly traded company based in Austin, Texas that manufactured medical devices. Pet. App. 2-3. Over several years, petitioner carried out a "channel-stuffing" scheme. *Id.* at 3. Channel stuffing is a form of fraud in which a company inflates its revenue figures, usually "to meet Wall Street earnings expectations." *Id.* at 3-4 (citation omitted). Under such a scheme, "a company that anticipates missing its earnings goals" agrees "to sell products to a coconspirator"; the company records the sales "as revenue for the current quarter, increasing reported earnings"; and "[i]n the following quarter, the coconspirator returns the products, decreasing the company's reported earnings in that quarter." *Id.* at 4 (citation omitted). In effect, "the company fraudulently 'borrows' earnings from the future quarter to meet earnings expectations in the present." *Ibid.* (citation omitted). And "[i]f the company does not meet expectations in the second quarter, it might 'borrow' ever-larger amounts of money from future quarters, until the amounts become so large that they can no longer be hidden and the fraud is revealed." *Ibid.* (citation omitted).

Petitioner "carried out exactly this fraud," with one of ArthroCare's distributors "playing the role of coconspirator." Pet. App. 4 (citation omitted). Over several years, ArthroCare "fraudulently 'borrowed' around $26 million" through sham sales to the distributor. *Id.* at 4-5 (citation omitted). As the fraud began to unravel, petitioner made a number of false statements to investors and to the SEC. *Id.* at 6; C.A. ROA 12,469. "When all this was uncovered, ArthroCare restated its past earnings and revenue, causing its stock price to drop and its investors to sustain significant losses." Pet. App. 3.

2. A grand jury in the Western District of Texas indicted petitioner for conspiracy to commit wire and securities fraud, in violation of 18 U.S.C. 1349; nine counts of wire fraud, in violation of 18 U.S.C. 1343; two counts of securities fraud, in violation of 18 U.S.C. 1348 (2006); and three counts of false statements to the SEC, in violation of 18 U.S.C. 1001. C.A. ROA 3452-3458. A jury found petitioner guilty on all counts, but the court of appeals vacated those convictions after concluding that certain evidentiary rulings made by the district court were erroneous. 831 F.3d 608.

Before petitioner's retrial, the district court denied petitioner's motion to dismiss the wire-fraud counts. C.A. ROA 3435-3436. The court rejected petitioner's contention that, although ArthoCare's investors "may have lost money when the stock fell," petitioner's scheme did not amount to fraud because the investors "did not lose money to [petitioner]." *Id.* at 3350. The court noted that petitioner had "cite[d] no case directly holding [that] a defendant charged with wire fraud must be alleged to have personally obtained property from the victims of the scheme." *Id.* at 3435. And during petitioner's retrial, the court rejected petitioner's request

to instruct the jury that it could find a "scheme to defraud" for purposes of the wire-fraud and securities-fraud counts only if it found that the defendant intended to "acquire some money or property that the victim gives up." Pet. App. 25 (brackets omitted). The court instead instructed the jury that a "'scheme to defraud'" is "any plan, pattern, or course of action intended to deprive another of money or property, or bring about some financial gain to the person engaged in the scheme." *Id.* at 41, 44.

The jury acquitted petitioner of two wire-fraud counts and one false-statement count, but found petitioner guilty on the remaining counts. Pet. App. 8. The district court rejected petitioner's post-verdict motion for judgment of acquittal, in which petitioner renewed his contention that he could be convicted of wire fraud and securities fraud only if he acquired something that the victim of the fraud gave up. C.A. ROA 3982. The court explained that "in a scheme to defraud the focus is on depriving a victim of property for some benefit; precedent imposes no requirement that a defendant must directly gain or possess said property." *Ibid.* The court found that "substantial evidence was presented to show [that] the misleading and fraudulent statements made by [petitioner] induced investment in ArthroCare" and that "a rational trier of fact could have found the goal of the scheme * * * was to deprive investors of money they otherwise would have possessed." *Ibid.*

The district court sentenced petitioner to a term of 240 months of imprisonment, to be followed by five years of supervised release. 11/16/17 Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1-37. The court observed that "[t]he jury instructions here allowed for a conviction if [petitioner] intended to deceive

the victims out of their money for his own financial benefit." *Id.* at 31. And it explained that "[t]he evidence at trial showed that [petitioner] did just that: (1) He made false statements to investors and potential investors to induce them to hold onto or buy ArthroCare stock; (2) he knew the statements did not accurately reflect ArthroCare's business model or revenue projections; and (3) the scheme was intended to benefit [petitioner] via bonuses and appreciation of his own stock options." *Id.* at 31-32.

The court of appeals rejected petitioner's contention that the language of the wire-fraud statute "require[s] an intent to obtain property directly from a victim." Pet. App. 29. The court observed that petitioner's contention was inconsistent with *Carpenter* v. *United States*, 484 U.S. 19 (1987), in which this Court held that a defendant may be convicted of mail fraud even if the scheme does not entail the direct transfer of a specific property interest from the victim to the defendant. Pet. App. 30. The court of appeals likewise rejected petitioner's contention that precedent imposed "a 'mirror image' requirement," under which the defendant's gain must match the victim's loss. *Id.* at 26. The court observed that "no court has held that a 'mirror image' transaction is necessary." *Id.* at 27.

ARGUMENT

Petitioner renews his contention (Pet. 11-30) that the jury instructions improperly stated the elements of wire fraud and securities fraud. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any court of appeals. This case would also be a poor vehicle for reviewing the issue petitioner seeks to raise. Further review is not warranted.

1. The court of appeals correctly rejected petitioner's contention that the fraud statutes "require an intent to obtain property directly from a victim." Pet. App. 29.

A person commits wire fraud if, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" he "transmits or causes to be transmitted by means of wire * * * in interstate or foreign commerce, any writings * * * for the purpose of executing such scheme or artifice." 18 U.S.C. 1343. A person commits securities fraud if he "knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud any person in connection with [a registered security] * * * ; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of [a registered security]." 18 U.S.C. 1348 (2006). This Court has defined the phrase at issue in this case, "scheme or artifice to defraud," in terms that focus on whether the scheme seeks to deprive the victim of property—not on whether the scheme seeks to transfer a specific property interest directly from the victim to the defendant. See, *e.g.*, *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) ("[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.") (citation omitted); *McNally* v. *United States*, 483 U.S. 350, 358 (1987) ("[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'") (citation omitted).

This Court's decision in *Carpenter* v. *United States*, 484 U.S. 19 (1987), confirms that conviction under the

fraud statutes does not require proof of a direct transfer of a specific property interest. In *Carpenter*, the Court upheld mail-fraud and wire-fraud convictions of defendants who conspired to trade on financial information contained in a newspaper column before the column became public. *Id.* at 22-24. The Court observed that the mail-fraud and wire-fraud statutes "reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at 27. The Court noted that the newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the [information contained in the] column." *Id.* at 26. Although the defendants' scheme did not directly "transfer" (Pet. 14) that right of confidentiality and exclusivity from the newspaper to themselves, the Court had "little trouble" in holding that the defendants had engaged in a scheme to defraud by depriving the newspaper of that right and trading on the no-longer-confidential information themselves. *Carpenter*, 484 U.S. at 28. Thus, as the court of appeals correctly observed, petitioner's theory "is inconsistent with [this] Court's decision in *Carpenter*." Pet. App. 30.

2. Petitioner argues that the fraud statutes "prohibit schemes to obtain money or property," and that "'obtaining property requires "not only the deprivation but also the acquisition of property."'" Pet. 3 (brackets and citations omitted). But any such requirement was satisfied here. Petitioner sought to deprive investors of money by inducing them to invest in ArthroCare under the false belief that it was generating more revenue than it actually was. Pet. App. 32. And petitioner sought to acquire that money through "bonuses and appreciation of his own stock options." *Ibid.* Petitioner thus engaged

in a scheme to "gain from the investors' loss," Pet. 8, and would not be entitled to relief even on his own standard. Accordingly, even on petitioner's view of the statute, any error in the jury instructions in this case would have been harmless. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 4 (1999) (applying harmless-error analysis to error in jury instructions).

Petitioner's arguments (Pet. 12-15) about the meaning of the term "obtain"—in reliance on *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), *Sekhar* v. *United States*, 570 U.S. 729 (2013), and *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003)—accordingly do not suggest that his convictions here are infirm. Indeed, even in the context of extortion in violation of the Hobbs Act, 18 U.S.C. 1951(a), at issue in *Sekhar* and *Scheidler*, this Court has stated that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States* v. *Green*, 350 U.S. 415, 420 (1956); see *Sekhar*, 570 U.S. at 730; *Scheidler*, 537 U.S. at 400. Where, as here, a defendant deprives investors of money by deceptively inflating earnings, in a manner designed to enrich himself, he has committed fraud under any reasonable definition.

The other decisions of this Court cited by petitioner (Pet. 25-26) likewise do not show that his scheme falls outside the scope of the federal fraud statutes. In *Cleveland* v. *United States*, *supra*, this Court held that state gambling licenses were not "property" for purposes of the mail-fraud statute, on the ground that the state's interest in licensing gambling was regulatory rather than proprietary. See 531 U.S. at 15, 20-22. The Court did not suggest that it would not be fraud to trick investors about a company's financial health in order to line the

defendant's own pockets. Nor did the Court do so in *Skilling* v. *United States*, 561 U.S. 358 (2010), when in the course of explaining the history of the honest-services-fraud statute, it observed that, "[u]nlike the fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services theory target[s] corruption that lacked similar symmetry" because "a third party * * * provided the enrichment." *Id.* at 400 (citation omitted). As the Court made clear in its original rejection of the honest-services theory of property fraud, the flaw in that theory was that "the jury was not required to find that the [victim] itself was defrauded of any money or property." *McNally*, 483 U.S. at 360. The Court made clear in doing so that the statutory language covers "frauds involving money or property," *id.* at 359, and did not impose any requirement that would preclude a fraud conviction on these facts.

Finally, petitioner is wrong to argue (Pet. 18) that the Court should read an "obtain[ing] property" element into the securities-fraud statute, 18 U.S.C. 1348 (2006), in order to prevent it from overlapping with Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). This Court has explained that "substantial" "overlap" is "not uncommon in [federal] criminal statutes." *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014). In fact, the legislative history of the securities-fraud statute suggests that such overlap was intended. See 148 Cong. Rec. S7420-S7421 (July 26, 2002) (statement of Sen. Leahy) (explaining that the securities-fraud statute would free federal prosecutors from "resort[ing] to a patchwork of technical [securities] offenses and regulations" and "would create a new 25 year

felony for securities fraud—a more general and less technical provision").

3. The decision below does not conflict with the decision of any other court of appeals. Petitioner does not identify any decision holding that jury instructions similar to those given here are erroneous, or that facts similar to those at issue here do not support a federal fraud conviction.

Petitioner instead invokes (Pet. 26-28) a number of decisions involving inapposite contexts. The Seventh Circuit's discussion in *United States* v. *Blagojevich*, 794 F.3d 729 (2015), of whether an appointment to an executive office can be "obtaining of property" for purposes of an extortion charge did not purport to address the application of the fraud statutes to a scheme like the one here. *Id.* at 736. Three of the cases cited by petitioner concern whether the federal fraud statutes apply to buyers who deceive sellers about the use to which the goods will be put. See *United States* v. *Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019) (deception about identity of recipient of machineguns), petition for cert. pending, No. 19-782 (filed Nov. 20, 2019); *United States* v. *Sadler*, 750 F.3d 585, 590-591 (6th Cir. 2014) (deception about identity of purchasers of drugs); *United States* v. *Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992) (deception about location where purchased goods would be used). But this case does not involve a buyer's deception of a seller. And in the remaining decision on which petitioner relies, the Seventh Circuit concluded that a wire-fraud prosecution where the losses were not at "the expense of the victims," whose losses where instead just "by-products of a deceitful scheme," was invalid. *United States* v. *Walters*, 997 F.2d 1219, 1227 (1993). But it is far from clear that the Seventh Circuit would view this

case—where the very object of the scheme was to deprive investors of property by inducing them to buy or hold ArthroCare stock to petitioner's benefit, see Pet. App. 32—to similarly involve only "indirect" or "incidental" harm, *Walters*, 997 F.2d at 1225-1226.

4. In all events, this case would be a poor vehicle for reviewing the issues that petitioner seeks to raise. In both this Court and the court of appeals, petitioner has treated the wire-fraud statute and securities-fraud statute identically. See Pet. C.A. Br. 44 & n.6; Gov't C.A. Br. 49. And the Fifth Circuit understood petitioner to have raised an argument only about "the wire fraud statute, 18 U.S.C. § 1343"; it accordingly addressed only the wire-fraud statute in the relevant section of its opinion. Pet. App. 25; see *id.* at 27 ("the language of § 1343"); *id.* at 29 ("Section 1343 does not require an intent to obtain property directly from a victim."). But the wire-fraud and securities-fraud statutes are not identical. Compare 18 U.S.C. 1343, with 18 U.S.C. 1348 (2006); cf. *Loughrin*, 573 U.S. at 359 (identifying structural differences between different federal fraud statutes for certain purposes). Granting review would therefore require this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to address the securities-fraud statute in the first instance, without the benefit of a court of appeals opinion analyzing that statute's distinctive text and structure.

Nor does any sound basis exist to grant petitioner's request (Pet. 28-30) to hold this petition for a writ of certiorari for *Kelly* v. *United States*, No. 18-1059 (argued Jan. 14, 2020). The question presented by the petitioner in *Kelly* is whether a public official defrauds the government of its property "by advancing a 'public pol-

icy reason' for an official decision that is not her subjective 'real reason' for making the decision." Pet. at i, *Kelly*, *supra* (No. 18-1059). Even if the Court were to conclude that the public-official defendants in that case did not defraud a public agency of its resources through their misrepresentations, it would not suggest that the fraud statutes are inapplicable to the distinct scheme here, in which petitioner fraudulently induced investments of money to line his own pockets.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
WILLIAM A. GLASER
Attorney

FEBRUARY 2020